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# Frank Taylor and Margeret Garner dba Frank Taylor and Garner v. Lee L. Dahl and Peter W. Hummel : Brief of Appellants

Utah Supreme Court


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# IN THE SUPREME COURT OF THE STATE OF UTAH



FRANK TAYLOR and MARGARET GARNER, d/b/a FRANK TAYLOR and GARNER,
*Plaintiffs and Appellant,*

—vs.—

LEE L. DAHL,
*Defendant and Appellant,*

and

PETER W. HUMMEL,
*Defendant and Respondent.*

Case No. 9172

# APPELLANTS' BRIEF

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## STATEMENT OF FACTS

This is an appeal by the Plaintiffs and by the Defendant Lee L. Dahl from a Summary Judgment entered by the Honorable Stewart M. Hanson on the 23rd day of October, 1959, (R. 29).

This action was originally commenced by Frank Taylor and Margaret S. Garner, doing business as Frank Taylor and Garner, the Plaintiffs, against Lee L. Dahl and Peter W. Hummel as Defendants on the 24th day of February, 1959, (R. 1). Plaintiffs allege that they are

duly licensed real estate brokers in the State of Utah and that the Plaintiffs obtained the earnest money agreement which is attached to Plaintiffs' Complaint and marked Exhibit "A," (R. 4) signed by the parties and a deposit of $10,000 on the purchase of the home of the Seller Lee L. Dahl by the Purchaser, Peter W. Hummel. The Plaintiffs also obtained a sales agency agreement from the Defendant Lee L. Dahl wherein and whereby it was agreed that a 5% commission was to be paid to the Plaintiffs for the sale of said home. After the execution of the earnest money receipt the parties had a dispute and the actual transfer of property was never consummated. The Plaintiffs did not claim the full $10,000 and in order to be relieved of any duplicate claims tendered into Court the $10,000 less the real estate commission of $3,750.00, and by Plaintiffs' Complaint sought to have the Court adjudicate the rights of the parties in and to the $6,250.00 and to award to the Plaintiffs the real estate commission of $3,750.00 and reasonable attorney's fees in connection with the action brought, (R. 1-4). The Defendant, Peter W. Hummel, in answering Plaintiffs' Complaint admitted that the Plaintiffs were licensed brokers in the State of Utah; that the Defendant Dahl was a resident of Salt Lake County; that the Defendant Hummel was a non-resident, but the property which was made the subject of the suit was within the jurisdiction of the Court, (R. 5). The Defendant further admitted that he had deposited the sum of $10,000 with the Plaintiff and that his signature was genuine on the earnest money receipt, (R. 5). Defendant Hummel further alleges that he has made demand upon the Plaintiffs for the return of the full $10,000

which the Plaintiffs and the Defendant Lee L. Dahl have refused to return and admits that disputes have arisen between the Defendant Hummel and the Defendant Lee L. Dahl and generally denies Plaintiffs' Complaint except for asking that the full $10,000 should be returned to this Defendant, (R. 5-6). The Defendant Hummel then filed a counterclaim in which he admits that he has deposited with the Plaintiffs the sum of $10,000 and signed the earnest money agreement which is heretofore referred to and affirmatively alleges that that written instrument was uncompleted in that the agreed plans and specifications detailing the finished worked to be completed had not been procured, (R. 6). This Defendant further alleges that the deposit of the money was conditional upon the Defendant Hummel being able to procure plans and specifications for the work to be completed which were to be subject to his approval and that no approval was ever obtained from him, (R. 7). The Defendant further alleges that there was misrepresentations on several occasions as to the square footage of the home and that upon learning of the misrepresentations he refused to further negotiate or further consumate the sale and that this Defendant has demanded the return of the $10,000 to himself, (R. 7).

The Defendant, Lee L. Dahl, in answering Plaintiffs' Complaint admits that the Plaintiffs are licensed brokers and that the parties are residents of Salt Lake County, except for the Defendant Hummel, but that the property is within the jurisdiction of the court which is the subject of this law suit, and further admits that a sales agency agreement had been executed between the Plain-

tiffs and this Defendant on the home which is the subject of this law suit, and further admits that the Plaintiffs obtained a purchaser for the property in the Defendant Hummel and that the Defendant Hummel deposited the $10,000 earnest money and that the earnest money agreement was executed by the parties, (R. 9). This Defendant, Lee L. Dahl, denies that the Plaintiffs are entitled to a real estate commission out of the fund and that the Plaintiffs are entitled to any attorney's fees in connection with their action but that the money should all be paid over to Lee L. Dahl, (R. 10). The Defendant, Lee L. Dahl, then filed a counterclaim alleging that the earnest money agreement was entered into but that the Defendant Peter Hummel after the entering of the earnest money agreement withdrew from his contractual obligation and refused to complete the agreement, (R. 10-11). He further claims that the Plaintiffs had refused to turn over to this Defendant the earnest money in the amount of $10,000 which was held in trust for the Defendant as liquidated damages and that by reason of the fact that the purchaser Peter Hummel had failed to complete the transaction the Plaintiffs were not entitled to their real estate commission or any of the money held by them and that the money should be paid over to the Defendant Dahl, (R. 11). The Defendant Dahl also asks for punitive damages against the Plaintiffs for their failure to turn over the money to him.

To these Counterclaims the Plaintiffs filed an Answer acknowledging the execution of the documents but denying that Plaintiffs were liable to the Defendants for the return of the full $10,000.00 because of Plaintiff's

real estate commission, (R. 13-16). The Defendant Lee Dahl filed a cross complaint against the Defendant Peter Hummel, (R. 17). In this cross complaint the Defendant Dahl alleges that Mr. Dahl and Mr. Hummel entered into an earnest money agreement which was executed by the parties and that the Defendant Hummel had deposited as earnest money the sum of $10,000.00 to secure and apply to the purchase price of the property located at 5834 Brentwood Drive, Salt Lake City, Utah, this being the property in question in the law suit. It is further alleged that the Defendant Hummel had failed and refused to complete the terms of the agreement and that the Defendant Dahl should be entitled to the $10,000.00 as a liquidated damage and that further because the Defendant Hummel had requested certain changes be made in the property which had been performed by the Defendant Dahl that the Defendant Hummel should be liable to the Defendant Dahl for the sum of $3,000.00 for the additional costs and expenses incurred and for attorney's fees as prayed.

The Defendant Hummel filed an answer to the cross complaint in which he denies that there had been an agreement entered into between the parties in that the agreement was not complete and that there were misrepresentations as to the property, (R. 21-23). The Defendant Dahl filed a reply to the answer to the cross complaint in which he alleges that there was no misrepresentation because the Defendant Hummel had personally inspected the property and that the agreement was complete between the parties, (R. 24).

On April 13th and 14th of 1959, depositions were taken of the Plaintiff Margaret S. Garner and of each of the Defendants Lee L. Dahl and Peter W. Hummel. These depositions are part of the record of this case. After the depositions were taken a pre-trial conference was held before the Honorable Merrill C. Faux and a pre-trial order entered on September 11, 1959, (R. 26-28). Each of the parties hereto then filed a separate motion for Summary Judgment and the respective motions came on for hearing on the 15th day of October, 1959, before the Honorable Stewart M. Hanson. The Court, on the 23rd day of October, 1959, granted the Defendant Peter W. Hummel's Motion for Summary Judgment against the Defendant Lee Dahl and against the Plaintiffs, (R. 29-30).

It is from this Motion for Summary Judgment that the Plaintiffs and the Defendant Lee L. Dahl have appealed. The Motion for Summary Judgment was based upon the pleadings and upon the depositions and exhibits submitted at the pre-trial conference. There were no separate affidavits submitted with any of the motions for summary judgment.

In order to give the court a better understanding of the facts, the Appellants desire to give a brief summation of what was produced at the deposition as to the actual background for this law suit. In order to simplify this brief, the depositions will hereafter be referred to by citing the depositions as follows: Margaret S. Garner will be cited as "G" followed by the page reference, Peter W. Hummel will be cited as "H" followed by the

page reference and Lee L. Dahl will be cited as "D" followed by the page reference.

The Defendant Hummel is a graduate geologist and during all times material hereto was living out of the state of Utah but had been interested in finding a home to purchase here in Salt Iake City. About the end of October, or the first part of November, 1958, the Defendant Hummel contacted the Plaintiff Margaret Garner for the purpose of having her, as a licensed real estate agent, help him to find a home in Salt Lake City, (H. 3). The Defendant Hummel described to Margaret Garner the general size and type of a home in which he would be interested, (H. 3). On five or six occasions prior to December 16, 1958, Mr. Hummel and Mrs. Garner went out to look at different homes, (H. 4). The particular home under construction and which gives rise to the basis of this law suit was located at 5834 Brentwood Drive in Salt Lake City. Mrs. Garner and Mr. Hummel drove by the home and took a look at it from the outside but because the doors were sealed up with a plastic material they couldn't get in, (H. 6). Subsequently, Mr. Hummel and Mrs. Garner managed to go through the interior of this home and made a complete inspection of it, (H. 6). At the time of the inspection of this home by the Defendant Hummel the exterior walls and interior walls were all constructed and the roof was on but the home had not had its interior decorating or interior fixtures installed, (H. 8). Defendant Hummel examined the property on several occasions. Before the earnest money agreement was entered into on December 16, 1958, Defendant Hummel

went through the property with Defendant Dahl. This home was being constructed by the Defendant Dahl for his own personal use, (D. 2). When the DefendantHummel expressed an interest in this property the Plaintiff Margaret Garner contacted the Defendant Dahl to see if he was interested in selling it and finally obtained a listing agreement from him on December 10, 1958, (D. 19 and Exhibit D2 attached to deposition).

Mr. Hummell was acquainted with the fact that this home was not one being constructed for sale but constructed for Mr. Dahl as his own home and that it was through the efforts of Mrs. Garner that Mr. Dahl would be willing to sell, (H. 9). Mr. Hummel said that he inquired about the square footage of the home and was told that it was approximately 4,000 square feet by Mr. Dahl and that Mrs. Garner said that she thought it was about 3,900 square feet, (H. 10). Mrs. Garner was asked in her deposition as to whether or not Mr. Hummel didn't ask Mr. Dahl the number of square feet and she replied that she recalled it was 3,700 or 3,900 something under 4,000 square feet, she wasn't certain, (G. 14). Mr. Dahl said that he thought there was approximately 4,000 square feet in the house but that he had never measured it, (D. 29-30). The Defendant Dahl had not made any blue print plans or specifications on the home before Mr. Hummel entered the picture since he was the owner-builder, (D. 6). There were, however, certain plans as to certain parts of it, such as the kitchen, (H. 11, 19). Mr. Hummel and Mr. Dahl had on occasions discussed the finishing of the house in respect to its decoration, utilities and fixtures.

After seeing the house on several occasions Mr. Hummel expressed the interest in it and on December 10, 1958, Mrs. Garner obtained the Sales Agency Contract from Mr. Dahl, (Exhibit D2 attached to D's deposition). She then contacted Mr. Hummel and said that she thought they could possibly get the house for $75,000.00, (H. 18). Mr. Hummel said that this was the price that was "suitable to me if we could get some indication as to how the house was to be finished and put it down." (H. 18). A general discussion had been held between Mr. Hummel and Mr. Dahl as to the completion but Mr. Hummel stated that he would like some further information on it and would be willing to pay $75,000.00 for the house "if it could be completed in a manner to me — quality wise, and so forth, in a manner of our mutual agreement." (H. 18).

On December 16, 1958, a earnest money receipt and offer to purchase was prepared by Mr. Wilford Kirton, attorney for Mr. Hummel and signed by Mr. Hummel as purchaser. Mr. Hummel was asked whether after the document had been prepared if he read it over:

"A. Yes.

"Q. Both the type written portion and the printed matter?

"A. The fine print, yes." (H. 22)

Mrs. Garner then took the earnest money receipt to Mr. Dahl for his signature and on the same date, December 16, 1958, obtained the signature of Mr. Dahl on the agreement, (G. 19). However, an addition was placed on the earnest money receipt and offer to pur-

chase in pen changing the completion date from January 15, 1959 to February 1st or sooner. (See Exhibit D3 attached to D's deposition, also H. 32). At the time of obtaining the signature of Mr. Dahl on the agreement Mrs. Garner also obtained the specifications as to how the home was to be completed by Mr. Dahl, (G. 19). These specifications were obtained in duplicate. On the same evening, Mrs. Garner then took one set of the specifications to Mr. Hummel late that same evening, (G. 29). At the time of delivering to Mr. Hummel a copy of the specifications, Mrs. Garner said, "Mr. Hummel, you have bought a house," (G. 29). Mr. Hummel then signed the receipt on the bottom portion of the Earnest Money Receipt and Offer to Purchase, acknowledging a complete copy of the agreement, (G. 20 and H. 33). During the periods of these negotiations and the signing of the agreement, Mrs. Hummel had not been present. Mr. Hummel indicated that he would like to bring his wife into the state to see the house. Subsequently Mrs. Hummel came into the State of Utah to go over the house. Mr. Hummel also contacted Mrs. Garner about procuring a landscaper to do development work on the outside of the house, (H. 33-34). Mr. Hummel brought an interior decorator with him when he subsequently came back to Utah in the forepart of January, 1959, (H. 41). He claims that at the time of the bringing in of the decorator and on this occasion in January he measured the square footage of the house and found it to be approximately 3,400 square feet, (H. 41). At the time of the execution of the Earnest Money and receipt nothing was said

by Mr. Hummel nor any of the other parties about the square footage in the house, (H. 22). Between the 16th day of December and the 10th day of January, Mr. Hummel had in his possession a copy of the specifications furnished by Mr. Dahl, through Mrs. Garner and during this time he never contacted Mr. Dahl about any changes in the home, (H. 45). Mr. Hummel said that he had, however, discussed in several phone conversations with Mrs. Garner the possibility that he would like to make some changes in the finishing work of the home. After the Earnest Money Agreement was executed by the parties hereto and the specifications delivered to Mr. Hummel he thereafter never asked Mrs. Garner whether or not there were any further specifications or plans, (G. 45). On the contrary he came again to Salt Lake with an interior decorator to help plan the final designing of the inside of the house. Mr. Dahl says that when Mr. and Mrs. Hummel came back to see the house in January, 1960, they went through the house and indicated the changes they wanted made, (D. 31).

Mrs. Garner states that the specifications to be attached to the earnest money receipt were those specifications showing exactly how Mr. Dahl had intended to complete the home for his own use, giving the details of what was to be done in the final decorating of the home as he had originally planned it, (G. 47). She further testified that it was also understood between the parties that if Mr. Hummel desired to make any changes or alterations in the specifications as originally contemplated by Mr. Dahl that Mr. Hummel would be

given credit if the change was for less money than what Mr. Dahl had planned or he would pay the additional cost if the change exceeded the cost contemplated by Mr. Dahl, (G. 47).

Mr. Hummel states this understanding as follows:

> "Q. I am interested, Mr. Hummel, in getting, insofar as possible, the substance of the conversation between you and Mrs. Garner before you went to Mr. Kirton's office. Now, first of all, did you discuss the purchase price as to what you would pay or what Mr. Dahl may be willing to sell this property for?
>
> "A. Yes, I think she did. I think she said — I was under the impression that she had talked to Mr. Dahl on the telephone and that through these discussions on the telephone with him she had felt that she could probably get the house for $75,000 and she told me this, and I said that this sort of a price was suitable to me if we could get some indication as to how the house was to be finished and put it down. She set the seventy-five thousand figure and I concurred.
>
> "Q. Had Mr. Dahl told you, prior to the time that Mrs. Garner stated that she thought it could be obtained for $75,000, how he had intended to complete the house in respect to the finishing matters, as to decorating, putting in of the utilities and the fixtures, as it is socalled?
>
> "A. He had spoken of it some in very general terms, yes." (H. 18)

The pre-trial order entered by Judge Faux on the 11th day of September, 1959, (R. 26-28) was prepared

by counsel and submitted to the court for his signature. This final draft was prepared by the attorney for Mr. Hummel and recites in it the position of Mr. Hummel as follows:

> "In his Answer, Defendant Hummel alleges that certain misrepresentations were made to him regarding the square footage of said home by the Defendant Dahl; that said misrepresentations were made for the purpose of deceiving said Defendant, and did deceive him; that he relied upon the same and by reason thereof, was induced to enter into the contract, and thereby seeks recision of the same and return of the deposit made. Defendant Hummel likewise alleges that the contract for the purchase of said home was not completed and that the execution of the Earnest Money Receipt and Offer to Purchase was conditional *upon approval* by said Hummel *of certain specifications* which were never approved by him so that no contract for the purchase of said home was in fact made." (R. 27) (Emphasis added).

At the pre-trial the Court framed certain issues to be resolved at trial. The first four issues to be resolved by the Trial Court were as follows:

> "1. As an issue of law, may the Defendant Hummel obtain recision on the ground of misrepresentations being made in connection with the square footage of said home.
>
> "2. In the event said Defendant may raise such issue, an issue of fact will be whether such misrepresentations were made as to justify recision of the contract.
>
> "3. Another issue of law is and will be whether the Defendant Hummel may introduce

oral testimony relative to the execution of said contract to the effect that said contract was signed conditionally and was not intended to be accepted as the completed contract between the parties.

"4. In the event that it is determined that Defendant Hummel may introduce oral testimony, an issue of fact will be whether or not the contract marked Exhibit "D3" is a binding contract between the parties." (R. 27)

As hereinbefore stated the Motions for Summary Judgment were then filed and the matter heard before the Honorable Stewart M. Hanson on the 15th day of October, 1959, and a Summary Judgment entered in favor of Defendant Peter Hummel and against the Defendant Dahl and the Plaintiff herein on the 23rd day of October, 1959. It is from this Summary Judgment that Plaintiffs and Defendants Dahl have appealed.

## STATEMENT OF POINTS

In connection with this appeal, Plaintiff contends:

### POINT I.

THE COURT ERRED IN HOLDING AS A MATTER OF LAW THAT THE DEFENDANT PETER W. HUMMEL WAS ENTITLED TO A SUMMARY JUDGMENT:

A. AS A MATTER OF LAW, THERE WAS A BINDING CONTRACT UPON THE PARTIES IN THE FORM OF THE EARNEST MONEY RECEIPT AND AGREEMENT.

B. THERE IS A BONA FIDE ISSUE OF FACT BETWEEN THE PARTIES AS TO WHETHER OR NOT THERE WAS A MISREPRESENTATION IN CONNECTION WITH THE AGREEMENT.

C. IN ANY EVENT WHETHER OR NOT THERE WAS A BINDING CONTRACT BETWEEN THE PARTIES WAS A QUESTION OF FACT TO BE SUBMITTED TO THE TRIER OF THE FACT.

## ARGUMENT

### POINT I.

THE COURT ERRED IN HOLDING AS A MATTER OF LAW THAT THE DEFENDANT PETER W. HUMMEL WAS ENTITLED TO A SUMMARY JUDGMENT:

A. AS A MATTER OF LAW, THERE WAS A BINDING CONTRACT UPON THE PARTIES IN THE FORM OF THE EARNEST MONEY RECEIPT AND AGREEMENT.

Because of the complexity of the issues and the numerous pleadings filed in this matter, the Court at pre-trial and after a discussion with the parties, asked the attorneys to prepare a pre-trial order in connection with this case. A draft of the pre-trial order was prepared by the Plaintiffs' attorney and submitted to the Defendants' attorneys. The changes were then made in this draft and the final pre-trial order prepared by Mr. Kirton, the attorney for the Defendant Hummel. It is significant to note that the allegations claimed by the Defendant Hummel were restricted to two in particular: First, that there had been a misrepresentation (as to this point the Appellant will discuss the same hereafter in the brief); and second, the pre-trial order states "Defendant Hummel likewise alleges that the contract for the purchase of said home was not completed and that the execution of the Earnest Money Receipt and Offer to Purchase was *conditional* upon

*approval* by Mr. Hummel of *certain specifications* which were never approved by him so that no contract for the purchase of said home was in fact made." (R. 27) (Emphasis added).

The Court in the pre-trial order then framed the issues to be resolved by the trial court. In Issue No. 3 the Court stated the issue as follows: "Another issue of law is and will be whether the Defendant Hummel may introduce oral testimony relative to the execution of said contract to the effect that said contract was signed conditionally and was not intended to be accepted as the completed contract by the parties." (R. 27). Having stated this as an issue of law, the Court then framed Issue No. 4 to be resolved by the trial court as follows: "In the event that it is determined that the Defendant Hummel may introduce oral testimony, an issue of fact will be whether or not the contract marked Exhibit "D3" is a binding contract between the Parties." (R. 27).

Thus clearly in view of the pre-trial order two issues in connection with whether or not the contract was a completed contract were fixed by the pre-trial order. First, an issue of law and assuming that a court should rule as a matter of law that the contract was conditional and that oral testimony could be introduced regarding its conditional effect then the court still kept as an issue, an issue of fact to be determined between the parties.

Insofar as the issues are concerned between the parties in this case, the pre-trial order governs. See

Rule 16 U.R.C.P. wherein it is stated in referring to the pre-trial order:

> "The court shall make an order which recites the action taken at the conference, the amendment allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; *and such order when entered controls the subsequent course of the action,* unless modified at the trial to prevent manifesting justice." (Emphasis added)

It is clear, therefore, that upon a Motion for Summary Judgment the Court could not resolve all of the issues because one of the issues was an issue of fact reserved and had to be determined even in spite of the fact that the court may have determined that the contract was signed conditionally and could allow oral testimony to that effect.

There has never been any argument nor is there any issue between the parties that the Earnest Money Receipt and Offer to Purchase was executed by the parties on December 16, 1958. The sole issue between these parties as to this agreement is whether or not the agreement was conditional in that the specifications had to be approved by Mr. Hummel. No real issue is made of the fact that there were never any plans attached because the home was 80 percent complete and the plans with design of location of rooms and so forth would all be superfluous, (D. 9 & 10). It was the specifications on how Mr. Dahl proposed to complete the house which gave Mr. Hummel the most concern. This

is bourne out by the pre-trial order since the only question raised was whether or not Mr. Hummel had to approve the specifications, (R. 27). The portion of the earnest money receipt which was prepared by Mr. Hummel's attorney and typed in reads as follows: "Seller agrees to furnish said home and premises in accordance with attached plan and spec., at his expense on or before the 15th day of January, 1959." (Exhibit D3 attached to D's deposition). Nothing is said in the earnest money receipt about the specifications being subject to the approval of Mr. Hummel. This is attempted to be proven by the Defendant Hummel by means of an oral modification of the written agreement and in direct violations of the terms of the agreement signed by all of the parties. The agreement clearly states that there are no verbal statements relative to the transaction in the following words: "It is understood and agreed that the terms written in this receipt constitute the entire Preliminary Contract between the purchaser and the seller, and *that no verbal statement made by anyone relative to this transaction shall be construed to be a part of this transaction unless incorporated in writing herein.*" (Emphasis added) (Lines 33 and 34 of Exhibit "D3" attached to Dahl's deposition).

It is admitted by all parties concerned that the specifications were prepared and submitted to Mr. Hummel at the time that he acknowledged a receipt of the final copy of the agreement bearing all the signatures of the parties on December 16, 1958, (G. 29; H. 33). In his deposition Mr. Hummel was asked and testified as follows about the fine print in the agreement:

"Q. After he had prepared the document to which we refer, Exhibit D-3, did you read it over?

"A. Yes.

"Q. Both the typewritten portion and the printed matter?

"A. *The fine print, yes.*" (Emphasis added) (H. 22)

Nowhere in the agreement is there any statment whatsoever that the agreement was conditional upon Mr. Hummel making a separate approval of the specifications. He in fact approved them when he took the specifications and signed the receipt on the agreement. He has never at any time claimed that the specifications were not as represented by Mr. Dahl in their prior conversation, (D. 50).

The understanding of Mr. Hummel as to the nature of the plans and specifications to be submitted is clearly shown in his deposition beginning with Page 18:

"Q. I am interested, Mr. Hummel, in getting, insofar as possible, the substance of the conversation between you and Mrs. Garner before you went to Mr. Kirton's office. Now, first of all, did you discuss the purchase price as to what you would pay or what Mr. Dahl may be willing to sell this property for?

"A. Yes, I think she did. I think she said — I was under the impression that she had talked to Mr. Dahl on the telephone and that through these discussions on the telephone with him she had felt that she could probably get the house for $75,000 and she told me this, and I said that this sort of a price was suitable to me if we

could get some indication as to how the house was to be finished and put it down. She set the seventy-five thousand figure and I concurred.

"Q. Had Mr. Dahl told you, prior to the time that Mrs. Garner stated that she thought it could be obtained for $75,000, how he had intended to complete the house in respect to the finishing matters, as to decorating, putting in of the utilities and fixtures, as it is so-called?

"A. He had spoken of it some in very general terms, yes.

"Q. And in the light of what Mr. Dahl had told you and your own physical observation of the property, did you believe that you would be willing to pay $75,000 for the property?

"A. Well, I didn't believe that I would be willing to pay $75,000 for the property as it stood. I felt that I would be willing to pay $75,000 for the property if it could be completed in a manner to my — quality wise, and so forth, in a manner of our mutual agreement.

"Q. When you speak of your mutual agreement, had you told Mr. Dahl on the morning or on the day that you inspected the property with him how you wanted the house to be completed?

"A. No.

"Q. So that the only information you had as to how the property was to be completed was what he had told you as to how he intended to complete it?

'A. Generally speaking, that is correct. But he hadn't told me in very specific terms. He just said generally that this type of fixture goes in the kitchen and this type of fixture goes some place else, and in completing a home there is

very much more detail work involved than just general —

"Q. In respect to the kitchen itself, had he not shown you the plans and drawings of the completion of the kitchen in accordance with the subcontractor that was going to install the cabinets?

"A. Yes, he showed me some of the plans there, yes.

"Q. And you were aware that there were no plot plans or profile drawings of the structure of the house itself, were you not?

"A. Yes.

"Q. And as far as that type of plan was concerned, there was no purpose after you saw the house to have any plan as to what was going to be done insofar as the base of the house or exterior walls or the roof because that had already been completed, isn't that right?

"A. Yes, that's correct." (H. 18 to 20)

It was never considered nor contemplated by the parties that any blueprints should be drawn to show the finished work in the house. The Court can take judicial notice as a matter of common policy that these are details which are included in the specifications as to the type of finish there is to be put into the home. As indicated by Mr. Hummel in his deposition the home so far as the structure and the walls and the interior walls were concerned was all fixed. It was only a matter of where and how the fixtures were to be placed in the rooms and what kind of paint, etc., was to be put in. At this point it was not contemplated nor under-

stood that Mr. Hummel was paying $75,000 for the home to be completed in the manner in which he desired because he was buying a home which was being built by Mr. Dahl for himself and it was the intent of the parties that Mr. Dahl would sell the home for the price of $75,000 with the finish as he had originally planned. Mr. Dahl and Mr. Hummel went through the home and outlined the details of what the plans were of Mr. Dahl in finishing the home.

It was the understanding and intention of the parties here that Mr. Hummel, if he desired to make any changes in the finishing work that was planned by Mr. Dahl, would either receive credit if the change was for a lesser amount than what Mr. Dahl had contemplated or would have to pay for an additional sum if the change was in excess of what Mr. Dahl had contemplated.

Mrs. Garner testified in response to questions by Mr. Nielsen as follows:

> "Q. And isn't it also a fact that Mr. Hummel verbally told Mr. Dahl that if, after receiving the details of how Mr. Dahl was going to complete it for himself, that Mrs. Hummel wanted to make any changes that Mr. Hummel would then pay any extra that would be required?
>
> "A. That is it exactly, and that is why no one was concerned with this.
>
> "Q. In other words, Exhibit D-4 was to assure Mr. Hummel that if his wife had no objection to the way Mr. Dahl had it planned that

Mr. Dahl would complete it according to those said specifications?

"A. Right.

"Q. But that if Mrs. Hummel did have any difference of opinion as to color and materials that she wanted in the finishing of the house, then they would pay extra or get a credit if they eliminated them?

"A. Right, and that was discussed many times.

"Q. So that the $75,000 which Mr. Hummel was to pay was to buy the house as it was, as he saw it, with the house to be finished as Mr. Dahl said he would finish it?

"A. That's the truth.

"Q. And if there were to be any changes made in it, just changes in any type of construction, he would be given a credit or a charge depending upon whether the changes necessitated additional work or eliminated work?

"A. Right. And he said that, I think, in front of you.

"Q. So that when you gave Mr. Hummel the specifications marked Exhibit D-4 that, so far as you were concerned, completed the transaction and compiled with the part of the earnest money receipt that said that the specifications would be attached?

"A. Definitely.

"Q. And was it after that, after you had given him the specifications, that Mr. Hummel then reconfirmed the contract by signing it?

"A. Yes, after he had these in his hands then he signed the receipt and signed the — initialed the completion date.

"Q. So that he not only reconfirmed the contract by signing the receipt for it, but he also confirmed an extension of time in which to complete it?

"A. That's right.

"Q. Did he thereafter at any time ever claim in your presence that the specifications which you had given him on the night of the 16th were not the specifications which he had requested or which Mr. Kirton had indicated he should get in connection with signing the earnest money receipt?

"A. Never." (G. 47 and 48)

The Defendant Hummel has never at any time asked for any further plans or blueprints in connection with home nor for any other specifications, (G. 38).

After Mr. Hummel signed the agreement on December 16, 1958, he returned to Salt Lake City in January, 1959, and at no time had he ever objected that the specifications were not as agreed, (D. 50 and G. 45). After the date of December 16th, Mr. Hummel even called Mrs. Garner and asked her to have a landscape gardner and interior decorator for the home, (G. 45). Mr. Hummel and his wife and their interior decorator went through the house in January, 1959 and told Mr. Dahl of the changes they wanted made. They marked up the finished walls, had cabinets removed, and had the outside of the house repainted from green to white in color. (D. 51 and 31). None of these items would indicate that they were to "approve" the specifications or that the agreement was "conditional." The conduct

of Mr. and Mrs. Hummel would indicate that they recognized the agreement as binding. Mr. Dahl testified in his deposition that Mr. Hummel called him and said that the "deal is off" "because you misrepresented the square footage." (D. 31) Nothing was said about approving or not approving the specifications. Their actions evidenced a contrary position to the one now taken by their attorney.

Surely the position of the Defendant Hummel has been and still is that he was to approve any specifications submitted and because of his failure to approve them there was no contract. The trial court in granting the motion for summary judgment has erred as a matter of law in holding that the agreement was subject to approval because the agreement does not at any place or any place in it say that the plans and specification were to be subject to the approval of the Defendant Hummel. On the contrary the agreement reads: "Seller agrees to finish said home and premises with attached plan and spec., at his expense on or before the 15th day of January, 1959." The Defendant Hummel has acknowledged a receipt of the agreement at the time that he received the specifications from Mrs. Garner. (Exhibit D3 attached to Dahl's deposition).

In this case it is admitted that the "attached plan and spec.," were not "attached" as such to the earnest money receipt and offer to purchase, but the Defendant Peter Hummel was delivered the specifications and has not complained of the fact that they were not attached but his position has been and is that he was

to approve the specifications as received. Again referring to the pre-trial order as prepared by Defendant Hummel's attorney, the order provides:

> "Defendant Hummel likewise alleges that the contract for the purchase of said home was not completed and that the execution of the earnest money receipt and offer to purchase was conditional upon *approval* by said Hummel *of certain specifications* which were never approved by him so that no contract for the purchase of said home was in fact made." (R. 27) (Emphasis added).

There is no place in the Earnest Money Receipt and Offer to Purchase wherein the approval was required by Mr. Hummel of the specifications. Since this receipt and form was prepared by Mr. Hummel's attorney at the instance and request of Mr. Hummel it would seem that if this was one of the conditions necessary for the contract that such a clause would have been placed in there by parties. Furthermore in quoting from the form on Line 33 to 35 the form reads as follows:

> "It is understood and agreed that the terms written in this reecipt constitute and entire preliminary contract between the purchaser and the seller, and that no verbal statements made by anyone relative to this transaction shall be construed to be a part of this transaction unless incorporated in writing herein."

Mr. Hummel said at the time of the executing of this agreement that he read it carefully, *including the fine print,* (H. 22). What the Defendant Hummel is

seeking to do here is to claim that there is no contract between the parties because there was no approval of specifications and this is in direct violation of the parol evidence rule. The contract itself is clear and unambiguous.

Briefly stated the parol evidence rule restricts the use of oral testimony which would tend to vary, or contradict the terms of an unambiguous written instrument.

By clear and unambiguous terms the contract in question (Exhibit D-3) recites that the building is to be completed in accordance with attached plans and specifications. Nothing in the writing gives any indication that the parties contemplated that the plans and specifications were to be approved before the contract became effective. Had this been the case it would have been very easy to insert an approval clause. However, this was not done and it should be noted that Defendant Hummel placed his signature on the agreement at two different times. First as the offeror and the second time acknowledging receipt of a *final* copy of the agreement.

This Court has frequently dealt with the Parol Evidence Rule. In a recent Federal case handed down by the Tenth Circuit (*Nephi Processing Plant v. Talbot,* 247 Fed. 2d 771) a problem very similar to the one now before the Court was ruled upon and the Utah law was examined by the Court. Briefly the facts were these: An agreement had been entered into between a

processing plant and an individual whereby the processing plant was to process the individual's turkeys. A provision in the contract provided that the individual should transport his turkeys to the plant, however, the individual contended that upon discussing this provision in the contract with the representative of the processor, the individual was told that the processing plant paid all but a very nominal portion of the transportation costs. The trial court allowed this parol evidence concerning the agreement as to transportation costs to come in. However, on appeal the Circuit Court reveresed the lower court and at page 775 of 247 Fed. 2d summarized the Utah law as follows:

> "The Talbots testified that prior to signing this agreement, Nephi had advised them that it would transport the turkeys without any charge except the Colorado ten mile tax. They said that they understood the language in the agreement to mean that they were to deliver the turkeys to Nephi's trucks, which in turn would deliver them to the processing plant. This testimony is inconsistent with the provisions of a written agreement between the parties. By unambiguous terms in the processing contract, the Talbots agreed to deliver the turkeys to the processor at Nephi, Utah. The terms of such a contract cannot be altered, varied or contradicted by parol evidence."

The court cited the following Utah cases on the point:

*Farr v. Wasatch Chemical Co.*, 105 Utah 272, 143 P.2d 281, 151 A.L.R. 275; *Garrett v. Ellison*, 93 Utah 184, 72 P.2d 449, 129 A.L.R. 666; *Halloran-Judge Trust*

*Co. v. Health,* 70 Utah 124, 258 P. 342, 64 A.L.R. 368; *Moyle v. Congregational Soc. of S.L.C.,* 16 Utah 169, 50 P. 806; *Degnan, Parol Evidence, The Utah Version,* 5 Utah Law Review, No. 2, 158.

Professor Ronan E. Degnan, in his article *"Parol Evidence — Utah Version,"* 5 Utah Law Review, No. 2, Page 162 summarizes the reasoning behind the Parol Evidence Law. His summary is squarely applicable in this instance since the Defendant Hummel acknowledges receiving a copy of the final agreement. Quoting from Page 162 of Vol. 5 of the Utah Law Review, Professor Degnan states the reasoning as follows:

> "This final agreement is the agreement of the parties; it is the jural act to which the law attributes changes in legal relationships. In short, the later agreement supersedes all former. Thus former negotiations or even agreements are excluded from a trial not because evidence as to their existence would be untrustworthy but because they are legally immaterial; if their existtence were proved or even admitted it would not affect the rules of law to be applied in determining the disposition of the case."

So the Defendant in this instance should be held to his bargain and should not be permitted to establish by parol terms which are not expressed in the agreement.

The Earnest Money Agreement and specifications which were delivered to Mr. Hummel at the time that he initialed the change in the agreement fixing the completion date as February 1 "or sooner" and signed at the bottom acknowledging "receipt of a final copy

of the foregoing agreement bearing all signatures" are attached to the depositions as exhibits.

B. THERE IS A BONA FIDE ISSUE OF FACT BETWEEN THE PARTIES AS TO WHETHER OR NOT THERE WAS A MISREPRESENTATION IN CONNECTION WITH THE AGREEMENT.

In the pre-trial order as signed by Judge Faux, the issues to be resolved at trial were enumerated with the first and second issues being as follows:

"1. As an issue of law, may the Defendant Hummel obtain recision on the ground of misrepresentations being made in connection with the square footage of said home.

"2. In the event said Defendants may raise such issue, an issue of fact will be whether such misrepresentations were made as to justify recision of the contract." (R. 27)

Again we call the Court's attention to the fact that a Summary Judgment may be granted when there is no dispute of facts and that the matter is clear to the court that the judgment should be granted in accordance with the relief prayed for. In this case the court has set up a definite issue of fact as to whether or not there were any such misrepresentations as would justify the recision of the contract. If there is any reasonable conflict in the evidence the motion for Summary Judgment must be reversed on these grounds. Certainly this is an issue of fact to be submitted to the trier of the

facts and not to be resolved by summary judgment. Mr. Dahl testified that when Mr. Hummel returned to Utah in January of 1960 after examining the home and having several conferences he called Mr. Dahl and said: "The deal is off." Mr. Dahl wanted to know why the deal was off. Mr. Hummel replied: "Because you misrepresented the square footage." (D. 31)

Mr. Hummel testified that he was concerned about the square footage of the home and in his deposition he testified as follows:

> "Well, I had been quite concerned, as I was in most of the homes that I went into, about the size of the house, so before talking to Mr. Dahl, but while still looking at the house with Mrs. Garner, I asked her, did she have any sort of an idea of the size of the house from the standpoint of square footage, and at that time she said she was not certain but that she thought it would be around 3,900 square feet. And then when we saw Mr. Dahl that first day, besides looking at the — walking through and looking at the various rooms, I asked him how big the house was, what was the square footage, and he said approximately 4,000, and then I asked him various questions which I cannot recall at this time about certain things as we walked through the house and how he intended to finish this and finish one and another and not— he told me various things but, being completely unfamiliar with decorating a home or furnishing a home, I had no real idea what the real significance of these things might be. I admit to being an amateur and so I felt that when the time came, why, I would hire some sort of a consultant to advise me." (H. 10).

Mr. Hummel further recalled a conversation with Mrs. Garner after talking to Mr. Dahl in which he and Mrs. Garner joked about the fact that Mr. Dahl was not certain about the number of square feet in the building. Mr. Hummel referred to this conversation by saying:

> ". . . This discussion that you are talking about with Mrs. Garner, I think I remember saying that, 'I don't think he knows what he has got in the house from the standpoint of what his expenses are and the rest of it. The fact that he said "approximately 4,000 square feet" makes it quite evident that he didn't know exactly how many square feet there are.'" (H. 13).

Mr. Dahl testified that he had never measured the square footage of the home and that he told Mr. Hummel that he did not know how many square feet there were in the home but he said it could be around 4,000 square feet, (D. 29). Mr. Dahl further said that because he had never measured, he assumed there could be anywhere from 3,500 to 4,500 square feet because this was something that he was not concerned with since he had built the home with the design and size in mind as to meet his needs and not with the over all size, (D. 30).

Mrs. Garner testified that she was present during the conversation between Mr. Hummel and Mr. Dahl and to the best of her recollection Mr. Dahl said it was somewhere between 3,700 and 3,900 square feet or something under 4,000. She didn't remember for sure. She said that she wasn't paying too much attention to the size being quoted, (G. 14). And Mrs. Garner further testified that when Mr. Hummel first inquired about the size of

the home she said that she had a tape measure and told him he could measure it if he wanted to but nothing was done about this, (G. 16). This obviously makes a conflict in the testimony and the facts to be determined by the trier of the fact and not on the Motion for Summary Judgment as to what representations were made and what reliance was made upon these representations.

A very excellent annotation entitled, "Tort liability for damages for misrepresentations as to the area of real property sold or exchanged" is contained in 54 A.L.R. 2d beginning at Page 660. In this annotation two statements of significance are quoted. The first is found on Page 681 wherein the annotator says:

> "The vendor of real property is liable in tort, where, with intent to deceive his purchaser, he or his agent misrepresented the quantity of the land, *and the purchaser relied upon such representations in making the purchase.*" (Emphasis added)

See also Page 682 wherein the annotator says:

> "*Where a vendee of real property justifiably relies upon the misrepresentations of the vendor* or his agent as to the area of the land, recovery may be had in tort if such representations are found to have been fraudulent." (Emphasis added)

In our case Mr. Hummel did not rely upon the representations made by Mr. Dahl and in fact made the statement to Mrs. Garner that he knew Mr. Dahl did not know how many square feet there were in the house, (H. 13).

The recent Utah case of *Pace v. Parrish,* (1952), 122 Utah 141, 247 P. 2d 273 cites the rules of law for this state by saying that the burden is upon a person claiming the fraudulent charges to prove them by clear and convincing evidence and further that the elements of the fraud are:

> "These are: (1) That a representation was made; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party, to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage. See Stuck v. Delta Land & Water Co., 63 Utah 495, 227 P. 791; Jones v. Pingree, 73 Utah 190, 273 P. 303; 23 Am. Jur. 773; 37 C.J.S., Fraud, Sec. 3, p. 215."

In the Parrish case one of the things complained of was a representation by the seller that the quality of the certain land was just as good in one place as another area and that the land could be cultivated, wherein and whereas in fact there were large boulders on the land and anyone by looking at the land could see that there were rocks the size of a man's head. The court stated:

> "Parrish did nothing to actively prevent the Paces from making an inspection of it and it would have been little trouble to do so. Under those circumstances, we believe that it must be said as a matter of law that the plaintiffs did not use reasonable care and diligence. They were,

therefore, not entitled to rely on the representation and that item of $1,750.00 in the judgment cannot be sustained."

In the Parrish case again, there was involved a portion of land which had been apparently referred to as being owned and which in fact was not owned by the seller yet the appearance of the land was such that it was impossible to tell that it was different from any other land in the area. The court found that it would have been expensive and involved for the purchasers to have made a survey and examination of the title to ascertain the ownership of this 11¾ acres and this court held that they were not obligated to do so under the circumstances and said "Their duty to use reasonable care would not require them to go to such lengths." Such is not the case in the matter of Mr. Hummel because Mrs. Garner offered to measure the building with him if he wanted and it was easily excessable and he could have made such measurements as he desired.

This is not a case where the person who claims he was defrauded was prevented from examining the property. Furthermore, Mr. Hummel admits that he knew that Mr. Dahl did not know how many square feet there were in the building and therefore did not rely upon any statement of Mr. Dahl's.

C. IN ANY EVENT WHETHER OR NOT THERE WAS A BINDING CONTRACT BETWEEN THE PARTIES WAS A QUESTION OF FACT TO BE SUBMITTED TO THE TRIER OF THE FACT.

In the pre-trial order the Court clearly sets out two issues of fact to be submitted:

"1. . . .

"2. In the event said Defendant may raise such issue, an issue of fact will be whether such misrepresentations were made as to justify recision of the contract.

"3. . . .

"4. In the event that it is determined that Defendant Hummel may introduce oral testimony, an issue of fact will be whether or not the contract marked Exhibit 'D 3' is a binding contract between the parties." (R. 27)

In this brief we have heretofore clearly pointed out that a definite conflict appears in the testimony between the parties. Certainly Mr. Dahl and Mrs. Garner claim that whether or not there was any misrepresentation of any facts as to square footage is a question of fact to be submitted and even assuming for the purpose of this argument that there may have been a misrepresentation, it is a question of fact as to whether or not Mr. Hummel relied upon it. This is particularly true in view of Mr. Hummel's statement that he didn't think Mr. Dahl knew how many square feet there were in the house, (R. 13).

Certainly, if Mr. Hummel is permitted to vary the terms of the written contract (Exhibit D3) attached to D's deposition), then it is a question of fact to be submitted to the trier of the fact as to whether or not the specifications were to be "approved" by Mr. Hummel before the contract became binding.

The evidence must be clear and unequivocal in order to support a Summary Judgment; see *Young v. Felornia*

(1952) 121 Utah 646, 244 P.2d 862 (Cert. denied 344 U.S. 885); *Ulibarri v. Christenson,* 2 Utah 367, 275 P. 2d 170; *Fountain v. Filson* (1949) 336 U.S. 681, 61 S. Ct. 754, 93 L. Ed. 971; *Holbrook et ux v. Webster's Inc., et al.,* (1958) 7 Utah 2d 148, 320 P 2d 661.

The rule of law as to review of a summary judgment is clearly stated in *Federal Practice and Procedure,* by Barren and Holtzoff, Vol. 3, P. 120, as follows:

> "On appeal from a summary judgment, the Court appeals should view the facts from a standpoint most favorable to the appellant and accept his allegations of fact as true, and assume a state of facts most favorable to him. On appeal from a summary judgment, the only question is whether the allegations of the party against whom it was rendered were sufficient to raise a material or genuine issue of fact."

Courts should only grant Summary Judgment where the facts are clear and unequivocal. *U.R.C.P.* 56 (*c*) provides in part as follows:

> ". . . The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to a judgment as a matter of law. . . ."

Professor Moore in his treatise on the Federal Rules of Civil Procedure has this comment on this particular rule:

> "The function of the summary judgment is to avoid a useless trial; and a trial is not only not

useless (sic) but absolutely necessary where there is a genuine issue as to any material fact. *In ruling on a motion for summary judgment the court's function is to determine whether such a genuine issue exists, not to resolve any factual issues.*" (*Moore's Federal Practice,* Vol. 6, p. 2101) (Emphasis added)

"The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to judgment as a matter of law. *The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact.* Since it is not the function of the trial court to adjudicate genuine factual issues at the hearing on the motion for summary judgment, in ruling on the motion *all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion.* And the papers supporting movant's position are closely scrutinized, while the opposing papers are indulgently treated, in determining whether the movant has satisfied his burden.

"To satisfy the moving party's burden the evidentiary material before the court, if taken as true, must establish the absence of any genuine issue of material fact, and it must appear that there is no real question as to the credibility of the evidentiary material, so that it is to be taken as true. If the non-existence of any genuine issue of material fact is established by such credible evidence that on the facts and the law the movant is entitled to judgment as a matter of law, the mo-

tion should be granted, unless the opposing party shows good reason why he is at the time of the hearing unable to present facts in opposition to the motion. If, however, the papers before the court disclose a real issue of credibility or, apart from credibility, fail to establish clearly that there is no genuine issue as to any material fact, the motion must be denied." (*Moore's Federal Practice,* Vol. 6, pp. 2133, 2126).

## CONCLUSION

In conclusion the Appellants respectfully request the Court to reverse the decision of the Honorable Stewart Hanson in awarding a Summary Judgment for the reasons and upon the grounds that there is no clear issue of law and fact which would allow the Defendant Peter Hummel to rescind the contract and be restored to the money that was deposited on the contract. The contract is clear and unequivocal and since the Defendant Hummel cannot alter or in any way change the terms thereof and furthermore because there was no misrepresentation or if any misrepresentation is claimed, it is a question of fact to be decided by the trier of the fact and not by summary judgment.

Respectfully submitted,

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